SUPREME COURT, U. S.
APR 7 1967
JOHN F. DAVIS, CLERK

No. 1009

IN THE
Supreme Court of the United States
OCTOBER TERM, 1966

WESTERN NATURAL GAS COMPANY, *Petitioner*,

v.

CITIES SERVICE GAS COMPANY, *Respondent*.

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

PETITION FOR REHEARING BY PETITIONER

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April 7, 1967

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PETITION FOR REHEARING BY PETITIONER

Petitioner prays that this Court grant rehearing of its order of March 13, 1967 denying the petition for writ of certiorari, and that a writ of certiorari issue to review the decision and judgment of the Supreme Court of the State of Delaware in the above-entitled case (No. 20, 1966 below) as prayed for in the petition filed January 24, 1967 herein. As alternatives to issuance of a writ of certiorari, Petitioner prays that this Court either hold this case in abeyance, or remand this case to the Supreme Court of the State of Delaware with directions to stay its judgment, pending resolution by the Federal Power Commission of proceedings now before it, more fully described herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT OR GRANTING ALTERNATIVE RELIEF

1. As set forth in the Petition, the principal issue in the instant case is whether the Federal Power Commission, rather than a state court in a collateral action, has primary jurisdiction over a controversy between Petitioner and Respondent as to an effective rate under the Natural Gas Act, 15 U.S.C. §§ 717-717w. The Supreme Court of the State of Delaware held in such collateral action below that the Commission does not have primary jurisdiction over that rate dispute.

2. In its Reply to Brief for Respondent in Opposition, Petitioner referred to complaint proceedings[1] instituted by it with the Commission on February 23, 1967, in an attempt to avoid the possibility of conflicting judgments of two courts of different states[2] and of the Commission itself regarding the effective rate of the natural gas which is the subject of the instant case.

3. At the time of this Court's Order of March 13, 1967, the Commission had not acted on Petitioner's complaint, nor had Defendants Hennigh, *et al.* responded thereto. On March 29, 1967, said Defendants filed their Response, stating as to the effective rate issue that they "are not bound by" the judgment of the Supreme Court of Delaware issued below; that "although the dispute was over rates for the sale and delivery of gas admittedly within the jurisdiction of

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[1] *Western Natural Gas Company* v. *Hennigh, et al.*, Docket No. RI67-310 (Reply, p. 2).

[2] The Delaware Court below and the District Court, Grant County, Kansas, before which is pending *Hennigh* v. *Western Natural Gas Company*, No. 2523.

the Federal Power Commission," nevertheless "such dispute was not within the primary or exclusive jurisdiction of the Federal Power Commission"; and that the suit instituted in the state court of Kansas "is beyond the jurisdiction of the Federal Power Commission." Subsequently, on April 3, 1967, the Commission issued an Order setting the proceeding for hearing on the question raised in Petitioner's complaint as to Commission jurisdiction over royalty owners. Should the Commission decide that it possesses such jurisdiction, necessarily it then would proceed to a determination of the rates at which gas royalties are payable,[3] including Petitioner's rate purportedly "established" by the Delaware courts below. By its Order of April 3, 1967, the Commission essentially has refused to defer exercising its jurisdiction over the matter in controversy below, and in the Kansas court. The intensified imminence of conflicting court and Commission decisions as to Petitioner's liabilities arising from the same subject matter thus is obvious: the Delaware Court has decided Petitioner must refund all amounts collected in excess of 8 cents per Mcf; the Kansas Court has been requested to rule that Petitioner must pay royalties based upon rates of 11 cents and 15 cents per Mcf; and the Commission may determine still different rates for payment of royalties.

4. Thus, at the time this Court denied certiorari, the Commission had not acted in the premises, and the Respondent was free to argue that the Commission in effect had declined to exercise its jurisdiction, so that state courts could adjudicate the applicable rates.

[3] As specified in *J. M. Huber Corp.* v. *Denman*, 367 F.2d 104, 121 (5th Cir. 1966).

Subsequent to the denial of certiorari, however, the Commission decided to test the extent of its jurisdiction in regard to royalty owners, and if it exercises that jurisdiction to the fullest, its decision necessarily will take into account and in effect determine the very rates that the court below has already set. The Commission, of course, asserts in its order that it will not at this hearing decide the "effective rate" issue raised in Western's complaint before the Commission, but if Commission jurisdiction is held to exist, the effective rate issue is unavoidable. At the very least, this is an issue which should be preserved pending Commission determination of the jurisdictional questions it has now said it will answer.

5. In light of the Commission's Order of April 3, 1967, the issue of primary jurisdiction raised by this case takes on great practical importance in the administration of the Natural Gas Act. This Court must act so as to allow the Commission to proceed to resolve this controversy unhindered by final state court rulings upon the same operative facts. In no way short of granting relief requested herein can the confrontation of such conflict be avoided.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, Petitioner respectfully urges that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Supreme Court of the State of Delaware.

As alternatives to such relief, Petitioner prays that this Court either hold this case in abeyance, or remand this case to the Supreme Court of the State of Delaware with directions to stay its judgment pending

resolution by the Federal Power Commission of the proceeding in *Western Natural Gas Company* v. *Hennigh, et al.*, FPC Docket No. RI67-310.

Respectfully submitted,

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April 7, 1967

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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